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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

K.C., a minor, by and through his Guardian Ad Litem, DEE RICK, Plaintiff, v. UPLAND UNIFIED SCHOOL DISTRICT, a Local Educational Agency, West End Special Education Local Plan Agency; and Joan Reilly, in her individual capacity; and Lynda Spicer, in her individual capacity; and the Office of Administrative Hearings/OAH, Defendants.	Case No. EDCV 06-1314-VAP (JCRx) **[Motion filed on August 5, 2008]** **ORDER GRANTING DEFENDANT UPLAND UNIFIED SCHOOL DISTRICT AND WEST END SPECIAL EDUCATION LOCAL PLAN AGENCY'S MOTION FOR SUMMARY JUDGMENT**

The Court has received and considered all papers filed in support of, and in opposition to, Defendants Upland Unified School District and West End Special Education Local Plan Agency's Motion for Summary Judgment. The Motion is appropriate for resolution without oral argument pursuant to Local Rule 7-15. The

hearing, currently set for October 27, 2008 at 10:00 a.m. is VACATED. For the reasons set forth below, the Court GRANTS the Motion.

I. BACKGROUND

When Plaintiff K.C., by and through his Guardian Ad Litem, filed his complaint, he was seven years old. (See Compl. ¶ 4.) K.C. suffers from autism and requires special education services under the laws of the State of California and the Individuals with Disabilities Education Act ("IDEA"). (See id. ¶ 11.) K.C. was enrolled in the Upland Unified School District, within the West End Special Education Local Plan Area. (See id. ¶ 4.) From June 2004 until September 2005, Plaintiff's mother and several education officials met to create and, later, to revise Plaintiff's Individual Education Plan ("IEP"), which determined what additional services would be provided to Plaintiff and who would provide them. (See id. at ¶¶ 13-31.) Following a meeting on August 22, 2005, disagreement arose between the parties over the IEP's duration and whether a district aide or private tutor would be used. (See id. at ¶¶ 29-31.)

On November 10, 2005, Plaintiff K.C. filed a "[D]ue [P]rocess Request" and "Motion for Stay-Put [Order]" with the California Office of Administrative Hearings ("OAH"), Special Education Division. On July 11, 2007, the OAH

Administrative Law Judge Wendy A. Weber issued a decision ("OAH Decision") denying Plaintiff's Request and Motion.

Plaintiff filed his complaint ("Compl.") in this Court on November 28, 2006, with the following claims: (1) "for determination of stay put/temporary restraining order," preliminary and permanent injunction, and for "order for stay put [sic]" against Defendants Upland Unified School District ("Upland USD") and West End Special Education Local Planning Agency ("SELPA"); (2) violation of 28 U.S.C. § 1983 against Defendants Joan Reilly ("Reilly") and Lynda Spicer ("Spicer"); (3) "violation of § 504 [sic]" against Defendants Upland USD and SELPA; (4) "denial of [D]ue [P]rocess" against Defendant OAH; and, (5) "denial of Individuals with Disabilities Education Act ("IDEA") stay-put" against Defendants Upland USD and SELPA.

Plaintiff filed his First Amended Complaint ("First Am. Compl.") on April 30, 2007 listing the following claims: (1) "denial of [D]ue [P]rocess rights" against Defendant OAH; (2) "for order reversing and enjoining existing OAH order for stay-put [sic]" against Defendants Upland USD, OAH, and SELPA; and (3) for preliminary and permanent injunction against Defendants Upland USD and SELPA.

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On October 11, 2007, Plaintiff filed a motion for leave to file a Second Amended Complaint.[1] On November 16, 2007, the court granted Plaintiff's motion and Plaintiff filed said document on that date. The Second Amended Complaint asserts the following claims: (1) "for order enjoining existing stay-put order" and for preliminary and permanent injunction against Defendants Upland USD and SELPA; (2) "for denial of due process rights" against Defendant California Department of Education ("Cal. DoE"); (3) "for violation of section 504 [sic]" against Defendants Upland USD and SELPA; (4) for violation of 28 U.S.C. § 1983 against Defendants Reilly and Spicer; (5) "for reversal of due process decision" against Defendants Upland USD and WELPA; (6) for attorney's fees and costs against Defendants Upland USD and WELPA. On January 16, 2008, the Court dismissed Plaintiff's fourth claim and Defendants Reilly and Spicer from the action.

On August 5, 2008, Defendants[2] filed their Motion for Summary Judgment ("Mot."), a Statement of Uncontroverted Facts, ("Def.'s SUF"), a proposed Order, a Request for

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[1] Plaintiff should have captioned the pleading as a "Second Amended and Supplemental Complaint" because it attempted to assert claims which had arisen after the filing of the original Complaint. See Fed. R. Civ. P. 15(d).

[2] For ease of reference, Defendants Upland USD and WELPA are referred to collectively in this Order as "Defendants."

Judicial Notice, the Declaration of Rosie Ruiz ("Ruiz Decl."), and the Declaration of Brian Sciacca ("Sciacca Decl."). Defendants move for summary judgment on Plaintiff's first, third, fifth and sixth causes of action. Plaintiff filed his Opposition to Defendants' summary judgment motion ("Opp'n"), a Statement of Genuine Issues of material fact (Pl.'s SGI), and the Declaration of Tania Whiteleather ("Whiteleather Decl.") on August 28, 2008. Defendants filed their Reply on September 8, 2008.

On September 10, 2008, the Court issued an Order requiring supplemental briefing on three issues not addressed in the parties' papers.[3] Defendants filed their supplemental brief ("Supp. Mot.") on September 17, 2008. Plaintiff neglected to file any opposition to Defendants' supplemental brief.

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[3] The Court ordered the parties to submit supplemental briefing on the following issues: "(1) Whether Plaintiff was required to exhaust his remedies as to his Section 504 claim before the OAH as a prerequisite to filing a claim in the U.S. District Court, and if so, whether he did so exhaust; (2) Whether an OAH's ruling on an IDEA claim has a preclusory effect in future proceedings before the U.S. District Court on a Section 504 claim; (3) Whether attorneys fees are available on a Section 504 claim when the party seeking the fees did not prevail before the OAH in his IDEA claim." (See Order dated September 10, 2008.)

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id.

The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144.

III. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

The Court grants Defendants' request for judicial notice of the Final Administrative Decision ("OAH Decision") issued by the OAH Administrative Law Judge. Fed. R. Evid 201. The Court does not take judicial notice of the facsimile cover sheet or the transmission confirmation page, although it considers them as evidence sufficiently authenticated by the Ruiz Declaration.

IV. UNCONTROVERTED FACTS[4]

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are

[4] Defendants limit their Motion to facts pertaining to whether or not Plaintiff filed his case within the applicable statute of limitations period. (See Mot.) The Court limits the scope of this Order accordingly.

"admitted to exist without controversy" for the purposes of this Motion. See Local Rule 56-3.

On November 10, 2005, Plaintiff K.C. filed a request for a Due Process hearing and a motion for a "stay-put" Order[5] with the California Office of Administrative Hearings ("OAH"), Special Education Division. (See OAH Decision at 1; Def.'s SUF ¶ 1.)

On July 11, 2007, OAH Administrative Law Judge Wendy A. Weber issued a final administrative decision. (See OAH Decision; Def.'s SUF ¶ 3-4.) The decision was served on all parties by facsimile and U.S. mail on July 11, 2007. (See Def.'s SUF ¶ 4.)

In this civil action, Plaintiff first sought leave to amend his pleading to add a claim seeking reversal of the OAH decision on October 11, 2007, ninety-two days after July 11, 2007. (See Def.'s SUF ¶ 6; Pl.'s SGI ¶ 1.) After the Court granted Plaintiff's Motion, Plaintiff

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[5] Title 20 U.S.C. § 1415 (j) defines a stay-put order ("Maintenance of current education placement") as follows: "Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

filed his Second Amended Complaint on November 16, 2007. (See Second Am. Compl.)

Since either July or September 2007,[6] Plaintiff has enrolled in another school district within a different SELPA and has agreed to implementation of an IEP developed by that new school district. (See Def.'s SUF ¶ 7; Pl.'s SGI ¶ 9.)

VI. DISCUSSION

A. Plaintiff's Fifth Claim, for Reversal of Due Process Decision

Defendants contend that Plaintiff failed to file his appeal timely from the OAH Decision. (Mot. at 5.) They argue this claim must be dismissed for failure to file it within the appropriate statute of limitations period. (Id.)

Plaintiff was required to file his appeal no later than ninety days from his "receipt of the hearing decision." Cal. Educ. Code § 56505(k). It is undisputed that Plaintiff "filed" his appeal ninety-two days after

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[6] Plaintiff's SGI ¶ 9 states, "KC has been attending school in another school district since July, 2007" whereas Plaintiff's Memorandum and Points of Authorities states, "Plaintiff acknowledges that, as of September, 2007, he was enrolled in a program in another school district."

his receipt of the hearing decision.[7] (Def.'s SUF ¶ 6; Pl.'s SGI ¶ 1.) Based on these undisputed material facts, Defendants are entitled to judgment as a matter of law on this issue.

In its January 16, 2008, Order ruling on Defendants' Motion to Dismiss, which neither party addressed here, the Court ruled:

> "[A] California regulation appears to set forth the proper manner of transmitting hearing decisions and other documents related to the special education due process hearings. See Cal. Code. Regs. tit. 5, § 3038. The regulation does not require a party's consent to receive

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[7] As stated above, Plaintiff filed a Motion on October 11, 2007 seeking leave to amend his First Amended Complaint in order to add a claim seeking reversal of the OAH decision. The Court granted the motion on November 16, 2007 and Plaintiff filed his Second Amended Complaint on that date.

As it is not in dispute between the parties, the Court views Plaintiff's Second Amended Complaint, specifically the "appeal" from the OAH decision, as constructively filed on October 11, 2007. Based on that date, Plaintiff's filing was two days late to satisfy the ninety-day Statute of Limitations period. The ninetieth day fell on October 8, 2007, which was a Court holiday, so Plaintiff had to file his appeal from the OAH Decision by at least October 9, 2007 to be timely.

The "appeal" claim involved "events different from those involved in the original action," namely, that the OAH Administrative Law Judge issued her final decision; the relation-back principle of Rule 15 of the Federal Rules of Civil Procedure does not apply. See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1057 (9th Cir. 1981).

electronic communications, nor does it provide an extension of time to respond to such communications, as Plaintiff asserts. Instead, the regulation provides:

> '[S]ervice of notice, motions, or other writings pertaining to special education due process hearing procedures to the California Special Education Hearing Office and any other person or entity are subject to the following provisions:
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> (a) The notice, motion, or writing shall be delivered personally or sent by mail or other means to the Hearing Office, person, or entity at their last known address and, if the person or entity is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.
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> (b) Unless a provision specifies the form of mail, service or notice by mail may be by first-class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.' Cal. Code Regs. tit. 5, § 3038 (emphasis added)."

The Regulation does not allow for an extension of time, based on method of service, to the 90 day statute of limitations period. Cal. Code Regs. tit. 5, § 3038. The parties fail to address this Regulation in their papers. The Court finds the Regulation dispositive of the issue and rejects Defendants' and Plaintiff's arguments about the applicability of 20 U.S.C. § 1415(h)(4)[8] or California Code of Civil Procedure ("C.C.P.") § 1013(e).[9]

As the Regulation is of parallel construction and relates to Cal. Gov. Code § 11440.20(b) ("Unless a provision specifies the form of mail, service or notice

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[8] Plaintiff argues that the IDEA, 20 U.S.C. § 1415(h)(4), preempts Cal. Gov. Code § 11440.20(b). (Opp'n at 4.) Plaintiff contends that the state law allows additional methods of service that the federal law does not, namely service by facsimile. Id. at 3 ("Pursuant to federal law, all due process IDEA administrative decisions are to be mailed to the parties. No other manner of service is authorized.") The Court has reviewed 20 U.S.C. § 1415(h)(4) and finds no such requirement. In fact, that section makes no reference to any required manner of service, besides noting that opinions must be in writing. See 20 U.S.C. § 1415(h)(4). The Court finds Plaintiff's argument without merit.

[9] Plaintiff argues he did not consent to service by facsimile as he alleges is required by the California Code of Civil Procedure ("C.C.P.") § 1013(e). Plaintiff presents declarations of Tania Whiteleather and Dee Rick as evidence that Plaintiff did not consent to service by facsimile. (See Whiteleather Decl. ¶ 2; Rick Decl. ¶ 2.) Plaintiff also argues that he should be allotted two extra days to the ninety day statute of limitations for two reasons: (1) the facsimile service of the OAH Decision; and, (2) Plaintiff did not file a notice of appeal, but rather a civil action. (Opp'n at 6-7.)

by mail may be ... by facsimile transmission if complete and without error ... in the discretion of the sender."), the Court considers the parties' arguments regarding the nature of the service of the OAH Decision.

Defendants argue service of the OAH Decision upon Plaintiff was complete and proper. (Mot. at 6.) They offer the declaration of Rosie Ruiz, a clerk at the California Office of Administrative Hearings, in support of this argument. (See Ruiz Decl. ¶ 3 ("On July 11, 2007, I served via facsimile, a copy of the [OAH] Decision ... on the attorneys of the parties to the action via both mail and facsimile transmission.").) Plaintiff argues, in contrast, that the Ruiz Decl. proves the incompleteness of the service of the OAH Decision. (Opp'n at 5.)

At the time it ruled on Defendants' Motion to Dismiss, the Court considered only the facts stated on the face of the Complaint. (See Order dated January 16, 2008.) The Court found the date of Plaintiff's receipt of the OAH Decision "not apparent from the face of the [Complaint]." (Id.) On summary judgment, however, the Court is not limited to the pleadings and considers all admissible evidence. The Ruiz and Whiteleather Declarations, taken together, show Plaintiff received the OAH Decision by facsimile on July 11, 2007. When filing

the original proof of service, Ruiz "inadvertently neglected to include the fax transmission report." (Ruiz Decl. ¶ 3.)

Ruiz's admitted oversight did not render the service of the OAH Decision "incomplete." There is no evidence that the copy of the OAH Decision received by Plaintiff was lacking or incomplete in any way; only the certificate of service was incomplete. The essential function of service is to provide notice (see, e.g., Henderson v. U.S., 517 U.S. 654, 671-72 (1996), and that function was fulfilled here. Plaintiff received notice by facsimile on July 11, 2007. See Whiteleather Decl. ¶ 3.

Plaintiff had no additional time beyond the 90 days allowed to appeal the OAH Decision. It is uncontroverted that Plaintiff did not even seek leave to amend his complaint until ninety-two days had elapsed after the OAH Decision was served on Plaintiff. Plaintiff's fifth claim is untimely and Defendants are entitled to judgment as a matter of law.

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B. Plaintiff's First Claim, for an Order Enjoining Existing Stay-Put Order and for Preliminary and Permanent Injunction

In his opposition to Defendants' Motion, Plaintiff states, "Plaintiff hereby withdraws his request for a stay-put order in this matter." (Opp'n at 8.) The Court understands this statement to mean Plaintiff seeks to withdraw his first claim entirely. In any event, the claim is moot due to Plaintiff K.C.'s enrollment in a new school district.

C. Plaintiff's Third Claim, for Violation of Section 504 of the Rehabilitation Act of 1973

Defendants argue that Plaintiff's third claim should be dismissed because it does nothing other than raise Plaintiff's untimely appeal from the OAH Decision through a new statutory vehicle, § 504 of the Rehabilitation Act. (Mot. at 11) It is undisputed that Plaintiff did not raise his § 504 claim before the Administrative Law Judge.

The IDEA states:

"Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [including § 504], or

> other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter [Assistance for Education of All Children with Disabilities], the procedures under subsections (f) [Impartial Due Process Hearing] and (g) [Appeal Procedures] of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(l) (internal citations omitted).

Although parents and disabled children may bring claims under federal laws other than the IDEA for education-related injuries, the IDEA exhaustion requirements must be met if the claims "seek relief that is also available under" the IDEA. 20 U.S.C. § 1415(l); Kutasi v. Las Virgenes Unified School Dist., 494 F.3d 1162, 1167 (9th Cir. 2007); Blanchard v. Morton Sch. Dist., 420 F.3d 918, 920 (9th Cir. 2005).

In Mark H. v. Lemahieu, 513 F.3d 922, 928 (9th Cir. 2008), the Ninth Circuit held that § 504 of the Rehabilitation Act and the IDEA are related statutes that provide different remedies: the IDEA provides injunctive relief and § 504 provides monetary damages. "For the purposes of exhaustion, relief that is also available under the IDEA does not necessarily mean relief that

fully satisfies the aggrieved party. Rather, it means relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers." Blanchard v. Morton School District, 420 F.3d 918, 921 (9th Cir. 2005) (internal quotations omitted) (citation omitted).

The technical difference of remedies available under each statute does not render the statutes sufficiently different that relief under § 504 is not "available under" the IDEA. Based on the face of 20 U.S.C. § 1415(l), Congress intended to subject § 504 claims to the same exhaustion requirements as IDEA claims. See 20 U.S.C. § 1415(l).

Other courts have reached this conclusion as well. J.W. ex rel. J.E.W. v. Fresno Unified School Dist., – F. Supp. 2d –, 2008 WL 2698647 at *2 (E.D. Cal. 2008) ("Plaintiff must exhaust his administrative remedies before bringing federal claims regarding a denial of publicly funded special education under the IDEA and Section 504."); see also Babicz v. School Bd. Of Broward County, 135 F.3d 1420, 1422 (11th Cir. 1998); Hope v. Cortines, 69 F.3d 687 (2nd Cir. 1995); Charlie F. by Neil F. v. Board of Educ. Of Stokie School District 68, 98 F.3d 989 (7th Cir. 1996). Plaintiff's failure to exhaust his § 504 claim before the OAH strips the Court of

subject matter jurisdiction over his § 504 claim. Accord J.W. ex rel. J.E.W., 2008 WL 2698647 at *2. There is no triable issue of fact on this claim and Defendants are entitled to judgment as a matter of law.

D. Plaintiff's Sixth Claim, for Attorney's Fees and Costs

Plaintiff is not a prevailing party on any claim raised before the Court. Thus, Plaintiff's claim for attorney's fees and costs fails. See 20 U.S.C. § 1415(i)(3)(B); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." (internal quotations omitted) (citation omitted)); see also Gellerman ex rel. Gellerman v. Calaveras Unified School Dist., 43 Fed. Appx. 28 (9th Cir. 2002) (district court did not abuse its discretion in refusing to award attorney's fees, under IDEA, to disabled student and his parent, because they did not prevail on any issue in action).

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VII. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated: October 7, 2008

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge